



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/ 21UD/LDC/2019/0038

Property : 22 Stockleigh Road
St Leonards on Sea
TN38 0JP

Applicant : Leon & Michael England

Representative : Carlton Property Management

Respondent : 1) Mr Thomas Sanderson & Mr Robert
Platt (Ground Floor Flat)
2) Mr Gholamreza Malekzai
(Second Floor Flat)

Representative : Gaby Hardwicke Solicitors
(1 only)

Type of Application : To dispense with the requirement to
consult lessees about major works

Tribunal Member(s) : Mr D Banfield FRICS

Date of Decision : 1 July 2019

The Tribunal grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works listed in the Colston Schedule at pages 79 to 82 of the bundle subject to:

The Applicant contributing £1,500 .00 to the First Respondent in respect of costs of legal representation.

In granting dispensation the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.

Background

1. The Applicants seek dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act.
2. The Applicants' representative explains that they took over from the previous agent on 1 December 2017 and that the works were originally specified in 2018 following Hastings Borough Council's issue of Notice of Breach of HMO Regulations. The specification included provisional sums in the tender documents to deal with matters that would be identified following the erection of scaffolding around the building. The project was scheduled to commence at the beginning of March 2019 but in December 2018 part of the ceiling in the second-floor flat bathroom collapsed after further roof leaks resulting in the need to re-accommodate the resident until the planned works were completed. After project works commenced and removal of external render there were large areas of brickwork that was found to be unstable and require rebuilding including the rear elevation and two chimney breasts to a flank elevation. The Applicants state that the original section 20 consultation for external and internal works resulted in the lowest tender of £82,966 plus VAT. According to the Applicant, the additional structural work required to the building is estimated to be in the region of £107,000. The Applicant has decided to fund the full cost of these works in view of their urgency but applies for dispensation so that it could recover the costs from the leaseholders.
3. On 20 May 2019 the Tribunal sent Directions to each Lessee. Attached to the Directions was a form for the lessees to return to the Tribunal indicating whether the application was agreed with, whether a written statement was to be sent to the applicant and whether an oral hearing was required.
4. The Directions noted that those parties not returning the form and those agreeing to the application would be removed as Respondents
5. Two replies were received both objecting to the Application. The remaining lessee who did not respond has been removed as a Respondent.
6. No requests have been received for an oral hearing and the application is therefore determined on the papers received in accordance with Rule 31 of the Tribunal's procedural rules.
7. The only issue for the Tribunal is if it is reasonable to dispense with any statutory consultation requirements. **This decision does not concern the issue of whether any service charge costs will be reasonable or payable.**
8. Page numbers in the bundle are indicated as [].

The Law

9. The relevant section of the Act reads as follows:

- a. 20ZA Consultation requirements:
 - b. (1) Where an application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.
10. The matter was examined in some detail by the Supreme Court in the case of *Daejan Investments Ltd v Benson*. In summary the Supreme Court noted the following
- a. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
 - b. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
 - c. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
 - d. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
 - e. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).
 - f. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
 - g. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
 - h. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
 - i. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Evidence

11. The bundle comprises a formal submission on behalf of the Applicant together with supporting documents and copies of the objections from or on behalf of the remaining Respondents. It was noted that the Applicant had omitted from the bundle the attached documents to the First Respondents' statement. These have therefore been taken from the copy sent direct to the Tribunal. Also received was a letter from Gaby Hardwicke dated 28 June 2019. The Tribunal's directions did not include a reply to

the Applicant's statement and in the absence of a request to vary directions as referred to in the Tribunal's guidance on Tribunal Procedure the contents of the letter have not been considered.

The Landlord's case

12. On 8 September 2017 Hastings Borough Council (the Council) wrote to the applicant listing required repairs following which Gradient Consultants Ltd were instructed to project manage the repairs. A Notice of Intention on the basis of the works required by the Council dated 9 April 2018 was served on leaseholders. [11] No observations nor nominations for contractors was received.
13. On 16 May 2019 (sic) a Section 20 Statement of Estimates was served on the leaseholders showing Colston Ltd as the lowest tenderers. [25]. Observations were received from the First Respondent and these were included in the contract statement.
14. Following access to the First Floor Flat in May 2018 Gradient Consultants identified significant problems including a collapsed ceiling supported by acrow props and floorboards in poor condition.
15. A further Section 20 Notice of Intention was served which referred to the First Floor Flat only.
16. On 5 December 2018 an email from the Council advised that a section of ceiling had fallen in the second floor flat [63] and an Emergency Prohibition Order was served. [65]
17. The sub-tenant was found alternative accommodation and the contractor instructed to start work as soon as could be arranged.
18. Gradient then arranged for the wood preservation company to inspect the basement flat who reported works were required, [69]
19. Competitive tenders were obtained for works to the first and second floor flats and the damp proofing works to the basement flat [53] following which a Statement of Estimates was issued on 10 May 2019[61]. The tender prices excluded a proportion of the works to the basement flat which would be directly met by the Applicants.
20. Scaffolding was erected and work commenced exposing areas of the building which revealed far more serious problems than was evident prior to the removal of the render.
21. Following an inspection on 2 April 2019 which included the interiors of the first and second floor flats Gradient prepared a site report dated 25 April 2019. [73]
22. Colston then prepared a revised schedule of their additional costs to identify the additional works uncovered following the removal of the render and not covered by either of the Section 20 consultations. [79].

23. Included in the bundle at pages 83 to 98 is Gradient's schedule of all the costs of works being undertaken.
24. Reference is made to the Daejan v Benson case and that the contractors had undertaken a substantial amount of work before the additional work was identified. This work would not necessarily have been identifiable without work already undertaken by the contractors and could not have formed part of the first section 20 Consultation.
25. Reference is also made to Reedbase Limited and Anr v Fattal and Ors in which the Court of Appeal provided the test of: -
 - a. Was sufficient information provided? and
 - b. Would a fresh consultation materially assist the leaseholders' statutory protection?

For the First respondent

26. The First Respondent's Statement in Response in opposing the application refers to the consultations carried out in 2016 and not proceeded with and that they were unaware of the works to be carried out in summer 2018 until advised by the Council.
27. A Notice of Intention dated 9 April 2019 (sic) was served but not a Statement of Estimates. A tender report was obtained dated April 2018 by Gradient Consultants recommending that Colston be appointed with a contract price of £82,965.71 plus VAT and fees.
28. The First Respondent queried why works were proposed to the second floor flat as an expense to the tenants.
29. The First Respondent was never notified of the appointment of a contractor following the Notices of Intention dated 18 May 2016, 19 October 2016 or 9 April 2018.
30. Nothing further was heard until 10 July 2018 when a further purported Notice of Intention to carry out works to the First Floor Flat was received.
31. Nothing further was heard until around 10 May 2019 when a purported Statement of Estimates referring to the Notice of Intention dated 10 July 2018 was received. This Notice is defective as it refers to works to the second floor flat as well as the first, provides only one quotation rather than two and refers to quotations for damp proofing works which were not included in the Notice of Intention.
32. Due to the lack of clarity in the Application it is unclear what works the Applicant is proposing to carry out and what the dispensation sought relates to.

33. As such it is not reasonable to grant dispensation from consultation for these very substantial works the omission of which will cause the tenants substantial prejudice.
34. The Applicant has made no meaningful attempt to comply with the consultation requirements and the tenants have had no opportunity to understand the nature of the proposed works or to understand the proposed costs.

The Second Respondent

35. Mr Malekzai refers to the requirements of *Daejan v Benson* and the need to: -
- a. Determine whether the work could be carried out at lower cost and *whether there are cheaper alternatives ways to carry out the work.*
 - b. He has no information as to whether *is actually a figure that is absolute.*
 - c. The work is not urgent and as such there is no need to dispense with consultation.
 - d. Should the Applicant provide compensation if dispensation is granted.
 - e. *Where the Applicants does not reduce the liability of the Respondents, then dispensation application should be dismissed.*
 - f. *There is nothing in the Applicants' application that they would take reasonable steps or undertake that they would make efforts to reduce the amount that the Third Respondent would have to pay to the Applicants for compensating for the work that needs to be carried out. This, it is submitted that would be highly prejudicial to the Third Respondent given that the Third Respondent would have to pay a substantial sum to compensate the Applicants for their work.*

36. The application should therefore be dismissed.

Determination

37. I first of all remind myself that this is an application for dispensation from consultation requirements only. Much is made of the alleged inadequacies of the previous consultations but, save as background information that issue does not concern this determination. I make no determination as to whether those consultations were compliant with the legislation.
38. The application as submitted and as outlined in paragraph 2 of Judge Tildesley's Directions of 20 May 2019 refers to the works for which dispensation is sought.
39. The application is however somewhat unclear as to whether the works to the basement, first and second floor flats the subject of the Notice of Estimates dated 10 May 2019 also require dispensation.

40. The Applicant refers to the additional costs estimated by the surveyor to be £107,000. The only information from Gradient in the bundle is the estimated project costs report where on page 98 the costs for the constituent parts of the total costs are set out as follows: -

a. Original tender works	£82,649.41
b. Lower ground floor flat works	£36,405.15
c. First floor flat works	£26,029.47
d. Bensleys works	£4,945.00
e. Additional works total	<u>£40,182.80</u>
f. TOTAL	<u>£190,211.83</u>

41. The £107,000 appears to relate to items b to e above and therefore includes works referred to in the second statement of estimates dated 10 May 2019.

42. There has been no suggestion by the applicant that this consultation was flawed in any way and I can only presume therefore that dispensation is required solely for the works listed in Colston's schedule at pages 79 to 82 and indicated to cost £40,182.80.

43. Although I have referred to costs in the preceding paragraphs this was simply to identify the works concerned and I do not determine whether the costs are reasonable or payable.

44. Accepting now that the works for which dispensation is required are those defects that were identified after work under the original contract had started the issue is whether the lessees have been prejudiced by not halting the contract to enable fresh consultations and tender process to take place.

45. Scaffolding had been erected, works on the original contract were proceeding and there would be inevitable abortive costs should work cease which may well negate any saving that a competitive tender may produce.

46. The Third Respondent says the work is not urgent. However, there is a Prohibition Order in place on his flat, the Council are insisting that repairs to this HMO are carried out and only by proceeding with these additional works will the property be returned to full use.

47. It is accepted that the sums involved are large but the test I must apply is whether those costs have been increased by the lack of consultation. This is an old property with what appears to be substantial outstanding repairs required and given the guidance provided by the Daejan case referred to above I am not satisfied that the lessees have been prejudiced by the lack of consultation on these additional works.

48. In view of the above I am minded to grant dispensation but before doing so must consider whether any conditions are appropriate.

49. As referred to above the extent of the application was unclear, not only to the Tribunal but also the lessees. Only when the bundle was received

containing the Colston and Gradient schedules could any certainty be reached.

50. If the application had been clearer it may have been that the First Respondent would not have considered it necessary to seek assistance from solicitors. As such I consider that it would be reasonable to require the Applicant to bear the reasonable legal costs of the First Respondent which I assess at £1,500.00.
51. **The Tribunal therefore grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the works listed in the Colston Schedule at pages 79 to 82 of the bundle subject to:**
52. **The Applicant contributing £1,500 .00 to the First Respondent in respect of costs of legal representation.**
53. **In granting dispensation the Tribunal makes no determination as to whether any service charge costs are reasonable or payable.**

D Banfield FRICS

1 July 2019

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
2. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
3. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the appeal is seeking.